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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

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Dated: June 10, 1999

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SUMMARY

Incumbent LECs in this proceeding urge the Commission to adopt an interpretation and implementation of the key network unbundling obligations of the Communications Act that would severely limit the availability of UNEs and assure that UNE-based entry would not be a viable alternative for provision of competitive local telecommunications services. Level 3 urges the Commission to adopt a more balanced implementation of Section 251(c)(3) that complies with the guidance provided by the Supreme Court in *Iowa Utilities Board* but that also preserves UNE-based market entry.

The Commission should assess the availability of network elements from sources independent of the incumbent LEC by determining whether they are actually available at materially the same cost, quality, ubiquity, and in the same time frame as UNEs. The Commission should use TELRIC pricing as the basis for comparison of costs of network elements versus UNEs and should additionally consider that only UNEs will enable other providers to share in incumbent LECs large economies or scale.

The Commission should reject incumbent LECs' effort to equate Section 251(c)(3) unbundling obligations with antitrust law. This, along with the proposal that unbundling obligations be defined on a geographic or regional basis, is merely their preferred legal and regulatory mechanism for narrowly defining their unbundling obligations. It is not required under the Act or *Iowa Utilities Board.* The Commission should also determine that the burden of proof to justify withholding network elements as UNEs should rest with the incumbent LEC.

The Commission should also establish a national minimum list of UNEs that states may add to, but not subtract, from. A national list will provide for the most efficient implementation of unbundling obligations for both incumbent and competitive LECs.

The initial list of UNEs adopted by the Commission in the *Local Competition Order* and the additional UNEs requested by Level 3 in this proceeding will maintain UNE-based entry as a viable alternative for provision of local telecommunications services. At the same time these UNEs are justified under the balanced implementation of the Act suggested by Level 3 and others in this proceeding. Accordingly, the Commission should designate these network elements as UNEs.

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COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Level 3 Communications, Inc. ("Level 3") submits these reply comments in the above-captioned proceeding[1] concerning what unbundled network elements ("UNEs") incumbent local exchange carriers ("LECs") must make available under Section 251(c)(3) of the Communications Act[2] on remand from the Supreme Court's decision in *AT&T v. Iowa Utilities Board* ("*Iowa Utilities Board*")[3] vacating the Commission's initial rules defining unbundled network elements.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, Second Further Notice of Proposed Rulemaking, DA 99-70 (rel. April 16, 1999) ("*NPRM*").

[2] 47 U.S.C. § 251(c)(3).

[3] *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

I. THE COMMISSION SHOULD ADOPT A BALANCED VIEW OF INCUMBENT LEC UNBUNDLING OBLIGATIONS

Level 3 urges the Commission to reject the constricted view presented by incumbent LECs toward their unbundling obligations under the Act. The Commission should adopt a balanced policy that incorporates the guidance provided by the Supreme Court while also preserving UNE-based entry as a realistic alternative to providing competitive local telecommunications services.

As pointed out by Level 3 and others in initial comments, the Commission is not compelled by the statute or *Iowa Utilities Board* to adopt a constricted view of incumbent LEC unbundling obligations in order to apply some limiting standard or to consider the availability of network elements outside the incumbent's network. Instead, the Commission can, and should, adopt an approach that genuinely limits incumbent LEC unbundling obligations as required by *Iowa Utilities Board* while also retaining UNEs as a genuine mode of market entry.

II. THE COMMISSION SHOULD NOT ADOPT INCUMBENT LECS' VIEW OF THEIR UNBUNDLING OBLIGATIONS

A. "Availability" Means More than Minimal Availability

In *Iowa Utilities Board*, the Supreme Court instructed the Commission to consider, in deciding which elements to designate as UNEs, "the availability of elements outside the incumbent's network."[4] The Commission should reject incumbent LEC views that, in effect, any degree of availability of a network element from sources other than the incumbent means that it is neither "necessary" as a UNE or that its unavailability as a UNE would not "impair" a competitor's ability

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[4] *Id.* at 735.

to provide service.[5] The mere possibility that a network element could be obtained from a source other than the ILEC, such as the suggestion that the Commission should consider whether other sources could potentially offer network elements,[6] should not be used to evaluate the "necessary" and "impair" standard. The incumbents suggestion that the mere hint of availability releases them from unbundling obligations would for all practical purposes essentially remove UNE-based entry as a way of providing competitive services. Accordingly, as urged by Level 3 and others in initial comments,[7] the Commission should "consider" the availability of elements from sources other than the incumbent by determining whether they are actually available at materially the same cost, quality, ubiquity, and in the same time frame as network elements as UNEs.

For the same reason, the Commission should reject the view that if one competitive LEC has self-provisioned a network element, then there is no need for access to it as a UNE.[8] The fact that one or a few competitors have self-provisioned a network element or obtained it from other sources does not show that the element is generally available. It may have been obtained at substantially higher cost and lower quality than would be the case if it were available as a UNE. Thus, the fact that some competitors may have obtained a network element from sources other than the incumbent does not mean that it is available to the extent that it is not "necessary" or that its absence as a UNE would not "impair" a competitor's ability to provide service.

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5 US West Comments at 11; USTA Comments at 33.

6 SBC Comments at 20-21.

7 Level 3 Comments at 5-7; RCN Comments at 12; ALTS Comments at 25-30; MCIWorldCom Comments at 15-17; AT&T Comments at 28.

8 Bell Atlantic Comments at 8; US West Comments at 12.

One example shows how, if implemented, the ILEC's policy would thwart the competitive intent of the Act. Assume that CLEC A wins a contract to provide services to a large business customer located in a business park. Based on the economics of the contract and providing service, CLEC A may decide to build its own loop out to the customer and through the business park. Under the ILEC's view, once that loop was completed, it would no longer be required to unbundle that loop. The anticompetitive impact of that policy occurs when CLEC B wins a contract for a smaller business customer in the same area. Because of the smaller revenues generated by this smaller customer, it would prove economically infeasible for CLEC B to construct its own loop to serve that customer. Under the ILECs' scenario, CLEC B would either have to construct the economically inefficient loop, or decline to provide service to that customer. This would have the result of not only harming the CLEC's business, but it would also harm consumers by reducing the numbers of competitors in the market willing to provide service to them.

In light of this possibility, Level 3 endorses the view of many commenters that a network element is not available unless there is a vibrant barrier-free competitive wholesale market for it.[9] If there is no wholesale market for a network element, it will not be available at comparable cost, quality, ubiquity, and timeliness as network elements available from the incumbent as UNEs.

The Commission should also reject the view that access to a network element as a UNE is "necessary" when it is "absolutely essential"[10] for competition or is indispensable for a competitive

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9 *See, e.g.*, Excel Comments at 8; Cable & Wireless Comments at 10.

10 USTA Comments at 5. *See also* Cox Comments at 24.

LEC to provide service.[11] Level 3 believes that other alternatives suggested in initial comments would comport with the Supreme Court's mandate while not unduly restricting access to network elements that competitive LECs genuinely need to provide service. Thus, a determination that access to a network element is "necessary" when there is no reasonable substitute available[12] that would permit an efficient competitor to provide service would adequately address the availability of network elements from sources other than the incumbent, as required by the Supreme Court. Level 3 also believes that defining a "necessary" element as one that without which the competitive LEC could not, as a practical matter provide service,[13] or as one that is a prerequisite to competition,[14] would also be adequate definitions.

Level 3 supports the suggestions that the Commission should limit "proprietary" elements to which the "necessary" standard would apply to those that would involve disclosure of property eligible for non-disclosure under intellectual property or trade secret laws.[15] The Commission should assure that incumbent LECs are not able to artificially restrict access to UNEs by entering into special agreements with vendors or customers that define certain information as proprietary that would not be eligible for protection under intellectual property laws.

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11 US West Comments at 26.

12 MCIWordCom Comments at i.

13 Northpoint Comments at 6.

14 Texas Public Service Commission at 6-7.

15 E.spire Comments at 5; MCIWorldCom Comments at 20-21.

Level 3 additionally urges the Commission to provide specific and clear definitions of "necessary" and "impair."[16] Competition has been significantly delayed over the last three years in part because nearly every ambiguity in the Act and the Commission's regulations has been debated and legally challenged. Certainty in application of the Commission's rules concerning access to UNEs will strongly promote the development of competition.

B. TELRIC Pricing is the Appropriate Basis for Comparison

The Commission should use TELRIC pricing as the basis for comparison between network elements as UNEs and those available from other sources. Since UNEs will be available at TELRIC prices, that must be the basis for the comparison. Incumbent LEC's concern about using TELRIC pricing as the basis for comparison shows that most network elements are not realistically available from other sources.[17] If there were a functioning competitive market for a network element, it would be available from other sources at TELRIC prices since TELRIC is the pricing that efficient providers will charge for goods and services in a competitive market. Incumbent LEC arguments that TELRIC pricing should not be the basis for comparison because TELRIC pricing is "imaginary" or fictional simply reflect their fundamental disagreement with TELRIC pricing and should be rejected.[18]

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16 *See* TRA Comments at 31-32.

17 US West Comments at 19.

18 *See* BellSouth Comments at 11-12.

C. Economies of Scale Should be Considered

The Commission should also take into account economies of scale in examining whether the unavailability of a network element as a UNE would impair a competitor's ability to provide service. Incumbent LECs enjoy a considerable advantage with economies of scale that other potential providers of network elements cannot duplicate. The Commission may take into account the fact that competitors will be able to provide service on the same basis as the incumbent only if they can enjoy the incumbent's economies of scale by purchasing certain network elements as a UNE, and that, its ability to provide competitive services will be impaired without access to such network elements as a UNE. Incumbent LEC's arguments that economies of scale should not be considered are little more than their effort to deny to competitors one of the key benefits of incumbency -- vast economies or scale.[19]

D. Antitrust Doctrine Should Not be the Guidepost for Unbundling Obligations

The Commission should reject the view that antitrust law or the "essential facilities doctrine" defines incumbent LEC unbundling obligations. To be blunt, incumbent LECs prefer to make antitrust law the guidepost of their unbundling obligations because they believe they can use antitrust law to narrow the elements that must be unbundled. If antitrust law were the basis for unbundling, there would have been little basis for putting the unbundling obligation in the Act since existing antitrust laws could be used to compel unbundling.

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[19] Ameritech Comments at 62-63; US West Comments at 15-23.

The ILECs' position is based on an inaccurate reading of the intentions of Congress. The Act was designed to remove barriers to market entry and not to punish wrongdoing.[20] The Act is designed to impose affirmative, procompetitive obligations on the ILECs with the sole intention of opening those markets to competition without considering whether the ILECs were violating antitrust law.[21] Under this framework, Congress had no reason to invoke the essential facilities doctrine to define unbundling because it adopted a standard of "necessary" and "impair."[22] Absent a clear directive from the Congress on the meaning of those terms, the Commission has the discretion to define them. The Commission should not accept the ILECs' invitation to make their unbundling obligations more narrow than Congress intended.[23]

E. The Commission May Consider Factors Other than "Necessary" and "Impair"

It is no surprise that incumbent LECs urge the Commission not to consider factors other than "necessary" or "impair."[24] As noted, incumbent LECs seek in this proceeding to restrict their unbundling obligations. In fact, the Commission is directly given authority to consider other factors because the Act directs the Commission to consider "necessary" and "impair" "at a minimum" in determining what network elements must be available as UNEs.[25] Thus, the Commission has the statutory authority to balance "necessary" and "impair" against other factors. Level 3 believes that

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20 Pilgrim Comments at 11.

21 MCIWorldCom Comments at 11.

22 See Qwest Comments at 49; Northpoint Comments at 11-12.

23 GTE Comments at 15; Ameritech Comments at 31; USTA Comments at 23.

24 Ameritech Comments at 48.

25 47 U.S.C. § 251(d)(2).

it would not be in the public interest to ignore other relevant factors. Similarly, the Commission should reject the ILECs' self-serving request that if it does consider other factors it should only consider factors that restrict unbundling obligations.[26] Level 3 submits that the Commission should consider all relevant factors including whether the availability of the network element as a UNE would promote the Act's central goal of competitive provision of local telecommunications services.

F. The Burden of Proof Should Fall on Incumbent LECs

Level 3 believes that competitive LECs should have the burden of justifying their position that a network element should not be designated as a UNE, or that any element should be removed from the national list. In particular, the incumbent should be required to demonstrate that a competitive wholesale market exists for the element in order for the element not to be designated a UNE or removed from the UNE list. This would necessarily require that the network element be available from more than one or two sources. This burden should be operative in this rulemaking and in whatever procedural mechanisms the Commission establishes for removal of UNEs from the list. The Commission should reject suggestions that it provide that this burden would shift to competitive LECs after a certain period of time after this rulemaking.[27] This would merely encourage incumbent LECs to thwart provision of UNEs until such time as the burden shifts.

III. UNBUNDLING OBLIGATIONS SHOULD APPLY TO NETWORK ELEMENTS USED TO PROVIDE ADVANCED SERVICES

The Commission should reject incumbent LEC requests that unbundling obligations cannot be applied to their provision of advanced services because they are not incumbents in the advanced

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[26] USTA Comments at 24.

[27] *Id.* at 45-46.

services market.[28] They contend that new entrants do not need access to incumbent LEC networks to be successful providers of advanced services and that, therefore, the unavailability of any network elements as UNEs would not "impair" their ability to provide advanced services.[29]

Level 3 urges the Commission to apply the same approach to designation of advanced services UNEs as for any other network elements. Indeed, this is required since the same statutory standards apply. In addition, advanced services functions will be an integral part of the same telecommunications network. Level 3 submits that if an incumbent LEC deploys new network elements and they are not available at comparable price, quality, timeliness, or ubiquity as they would be as a UNE, then designation as a UNE is justified. Accordingly, to the extent incumbent LECs appear to be asking for a sweeping exemption from unbundling obligations for network elements used for advanced services, this request should be rejected because unbundling would be required if the statutory standards are met. In this connection, the Commission has already determined that incumbent LEC provision of advanced services is fully subject to the market-opening provisions of the Act.[30] Level 3 strongly encourages the Commission to give substantial weight to the goal of Section 706 of the 1996 Act of promoting the availability of advanced telecommunications capability to all Americans. Level 3 notes that Section 706 also employs the tool of competition for facilitating the deployment of advanced telecommunications capabilities.

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[28] GTE Comments at 74; *see also* Bell Atlantic Comments at 40-42, BellSouth Comments at 32-33.

[29] SBC Comments at 67; GTE Comments at 73-77.

[30] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 11 (rel. August 7, 1998).

Designating advanced services elements as a UNE will help to ensure competitive entry for broadband services and promote deployment of these services to a broader group of Americans.

IV. A NATIONAL IMPLEMENTATION OF UNBUNDLING OBLIGATIONS IS REQUIRED

A. There is No Basis for A Geographic or Regional Implementation

As pointed out by Level 3 and other commenters, a national list of UNEs that all incumbent LECs must make available is the preferable approach for implementation of incumbent LEC unbundling obligations.[31] This would provide the most efficient way for competitive and incumbent LECs to identify network elements that must be offered as UNEs.

Incumbent LECs have failed to show a sufficient basis for adoption of a regional or geographic approach to unbundling. Incumbent LEC requests for a regional implementation of access to UNEs is correctly characterized as an effort to delay and thwart implementation of unbundling obligations by requiring that the Commission and/or state regulators engage in cumbersome regional market power analyses. In addition, Level 3's experience is that economic and technical factors are sufficiently uniform across the United States to permit adoption of a national list of minimum UNEs. Moreover, to the extent that a national list of UNEs would suffer from some degree of imprecision, there is no reason to believe that state-by-state implementation would be any better. State boundaries do not define economic, technical, or even geographic boundaries that could form a rationale basis for designation of UNEs. Significantly, many state commenters supported

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[31] Level 3 at 2-4; MCIWorldCom Comments at 7-8; Cable & Wireless Comments at 26.

adoption of a national list of UNEs.[32] Accordingly, the Commission should reject calls for a regional or state implementation of unbundling obligations.

B. States May Add to the List of UNEs but Not Subtract from It

Level 3 believes that the Commission should allow states to add to, but not subtract from, the national list of UNEs. This would permit states to respond to conditions that warrant additional UNEs.

However, states should exercise their authority pursuant to federal guidelines, such as definitions of "necessary" and "impair", that the Commission will adopt in this proceeding. *Iowa Utilities Board* recognized the Commission's overarching authority to implement the market-opening provisions of the Act.[33] Thus, the Commission has authority to determine the ground rules for designation of UNEs and may additionally preclude states from removing UNEs from the list if the Commission reasonably determines that a national list provides for the best implementation of the Act. Accordingly, the Commission should reject the apparent view of some state commissions that they have discretion to apply statutory standards independent of Commission interpretations of the Act.[34]

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[32] Comments of California Public Service Commission at 3; Comments of Connecticut Department of Public Utility Control at 3; Comments of Illinois Commerce Commission at 2; Comments of Iowa Utilities Board at 2; Comments of Public Utilities Commission of Ohio at 4; Comments of Public Utilities Commission of Texas at 2; Washington Utilities and Transportation Commission at 5.

[33] *Iowa Utilities Board*, 119 U.S. at 730 ("[Section] 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.").

[34] Comments of California Public Service Commission at 8-9; Comments of Illinois Commerce Commission at 2-3; Comments of Iowa Utilities Board at 2; Comments of Kentucky Public Service Commission at 1; Comments of New York State Department of Public Service at 2,

V. PROPOSED UNES

In its initial comments, Level 3 proposed a set of UNEs that would preserve of UNE-based entry as a viable alternative for competitive provision of local telecommunications services. At the same time, these UNEs would promote the competitive provision of advanced services by providing for DLSAMS, additional transport options, and subloop unbundling. In contrast, incumbent LECs believe that few if any network elements should be designated as UNEs. Even loops, some incumbent LECs contend, should not be designated as UNEs except outside of major markets.[35]

In support of their restrictive view incumbent LECs rely primarily on their cramped interpretations of the Act. As explained, the Commission is not required to accept those interpretations and can adopt a more balanced approach that will meet the guidelines of *Iowa Utilities Board* while also making UNEs far more available than what incumbent LECs suggest. If the Commission evaluates the availability of networks elements on the basis of whether there is a material difference in cost, quality, ubiquity, and timeliness, Level 3 believes that this will satisfy the Supreme Court's decision while providing for designation of all of the UNEs that Level 3 and others have requested as UNEs in this proceeding. Accordingly, Level 3 urges the Commission to adopt this approach and designate the requested network elements as UNEs.

4-5; Comments of Oregon Public Utilities Commission at 1; Comments of Public Utilities Commission of Ohio at 4-5; Comments of Public Utility Commission of Texas at 3; Comments of Vermont Public Service Board at 4-5; Comments of Washington Utilities and Transportation Commission at 7-8.

[35] USTA Comments at 8; SBC at 23.

Level 3 notes that several state commissions support designation of subloop elements as UNEs.[36] As pointed out by commenters, incumbent LECs are the sole source of sub-loop elements and, therefore, should be required to offer unbundled access to them.[37] The Commission should also define the loop to encompass loop electronics including multiplexing, and DLC systems.[38]

Level 3 also strongly disagrees with incumbent LECs' arguments that there is no need to designate transport as UNE since competitive LECs are not ordering or using incumbent LEC transport.[39] In fact, Level 3 has ordered DS-1, DS-2, and DS-3 interoffice transport in most markets in which it is offering, or planning to offer, service. Obtaining transport from incumbent LECs will continue to be integral to Level 3's business plans. In addition, it is not Level 3's experience that transport is available from other sources at the same price, quality, or ubiquity. Accordingly, transport should remain on the UNE list.

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[36] Illinois Commerce Commission Comments at 11; Texas Public Service Commission Comments at 15-16; Washington Utilities and Transportation Commission Comments at 3-4.

[37] Northpoint Comments at 16.

[38] MCIWorldCom Comments at 45-46.

[39] SBC Comments at 46; BA Comments at 26; GTE Comments 57.

VI. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these reply comments.

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CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that on this 10th day of June 1999, copies of the foregoing Reply Comments of Level 3 Communications Inc., were hand delivered to the parties listed below.

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